

No. 10-5627

**FILED**  
**May 12, 2011**  
LEONARD GREEN, Clerk

ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF  
TENNESSEE

## ORDER

Before: GILMAN, KETHLEDGE, and STRANCH, Circuit Judges.

John Davis Lee, II, a Tennessee resident proceeding pro se, appeals the district court's order affirming his misdemeanor conviction for failing to comply with roadway markings, entered by a magistrate judge. Lee's appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon review, this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

On May 19, 2007, Lee was operating a motorcycle on the Foothills Parkway in the Great Smoky Mountains National Park when Ranger Keith Gad stopped him and charged him with failing to comply with roadway markings -- that is, passing on solid double yellow lines -- in violation of 36 C.F.R. § 4.12. A violation of 36 C.F.R. § 4.12, which prohibits the failure to comply with the directions of a traffic control device within an area under the jurisdiction of the National Park Service, is a Class B misdemeanor, subject to imprisonment not to exceed six months and/or a fine of not more than \$5,000. 18 U.S.C. §§ 3559(a)(7), 3571(b)(6); 36 C.F.R. § 1.3(a). Rather than paying \$55 per the violation notice, Lee proceeded to trial on the charge. After a bench trial, the

magistrate judge found Lee guilty of failing to comply with roadway markings by passing on solid double yellow lines and imposed a \$100 fine, along with court costs and a special assessment in the amount of \$35.

Lee appealed his conviction to the district court pursuant to Federal Rule of Criminal Procedure 58(g)(2)(B), and the district court affirmed. Lee now appeals the district court's order. *See United States v. Gagnon*, 553 F.3d 1021, 1023 (6th Cir. 2009). On appeal, Lee raises numerous arguments, including the denial of evidence to which he would be entitled under *Brady v. Maryland*, 373 U.S. 83 (1963), tampering with evidence, perjury, selective enforcement in violation of his equal protection rights, the magistrate judge's lack of jurisdiction, denial of his right to a jury trial, denial of his right to advisory counsel, and insufficiency of the evidence. Lee moves this court to review the discovery motions filed before the magistrate judge but not included in the district court's record, to request any non-PACER exhibits from the district court, for PACER to provide public access to transcripts in the record, and for free access to PACER.

Applying the same standard of review as the district court, we review the magistrate judge's legal determinations de novo and his factual findings for clear error. *United States v. Evans*, 581 F.3d 333, 338 n.4 (6th Cir. 2009). We review the magistrate judge's decision on a discovery matter for an abuse of discretion. *United States v. Gray*, 521 F.3d 514, 529 (6th Cir. 2008).

First, Lee asserts that the magistrate judge denied his motion for *Brady* material, denying him the opportunity to discover exculpatory facts and to cross-examine the prosecution's witness regarding those facts. "[W]hile the *Brady* rule imposes a general obligation upon the government to disclose evidence that is favorable to the accused and material to guilt or punishment, the government typically is the sole judge of what evidence in its possession is subject to disclosure." *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988). In response to Lee's motion for *Brady* material, the government represented that it had provided Lee with a copy of the videotape made at the time of the stop by Ranger Gad and was unaware of any other *Brady* material to which he would be entitled. The magistrate judge did not abuse his discretion in finding that the government complied with its *Brady* obligations by turning over the videotape or in denying Lee's

request to present testimony in support of his motion. Furthermore, Lee has failed to establish a *Brady* violation because he has not shown that the government actually suppressed any evidence that was material and favorable to his defense. See *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007).

Nothing in the record supports Lee's allegation that the government tampered with the videotape made by Ranger Gad. Nor is Lee's bald accusation that Ranger Gad committed perjury supported by any evidence. See *Briscoe v. LaHue*, 460 U.S. 325, 343 (1983) ("Police officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the [government's] official witnesses."); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). The magistrate judge found that Ranger Gad's testimony was credible, and we will not reweigh that determination. See *United States v. Reid*, 357 F.3d 574, 582 (6th Cir. 2004).

Lee next claims selective enforcement in violation of his equal protection rights. An equal protection claim based on selective enforcement requires proof that a government actor "single[d] out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations." *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991). Asserting that he was a civilian motorcyclist exercising his right to travel, Lee complains that Ranger Gad, a person outside that category, committed various traffic violations in stopping him and was not arrested as he requested. Federal law specifically allows an operator of an authorized emergency vehicle to disregard traffic control devices and exceed the speed limit when pursuing or apprehending an actual or suspected violator. 36 C.F.R. § 4.3(a). Lee was not similarly situated to Ranger Gad, a law enforcement officer pursuing someone who had violated a traffic law, and a rational basis existed for their different treatment -- the needs of law enforcement in pursuing and apprehending persons who have violated the law. See *Boone v. Spurgess*, 385 F.3d 923, 932 (6th Cir. 2004).

Lee contends that the magistrate judge lacked jurisdiction to try this case. Under 18 U.S.C. § 3401(a), magistrate judges have the authority to preside over misdemeanor trials. While a person charged with a misdemeanor other than a petty offense may elect to be tried by a district judge, Lee was charged with a Class B misdemeanor, which is a petty offense, and therefore did not have this option. 18 U.S.C. §§ 19, 3401(b). Lee argues that he did not consent to the magistrate judge as required under Eastern District of Tennessee Local Rule 72.4, which provides: "Pursuant to 18 U.S.C. § 3401 and subject to the consent of the parties pursuant to Federal Rule of Criminal Procedure 58(b), the magistrate judges of this district are designated to exercise jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed in this district." E.D. Tenn. R. 72.4(a). Consistent with 18 U.S.C. § 3401(b), Federal Rule of Criminal Procedure 58(b)(2)(E)(i) states that a defendant has "the right to trial, judgment, and sentencing before a district court judge -- unless . . . the charge is a petty offense." Nothing in the local or federal rules required Lee's consent to be tried by the magistrate judge for this petty offense.

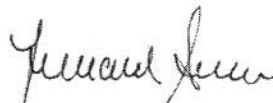
Lee next argues that he was entitled to a jury trial. The Supreme Court has held that a defendant is entitled to a jury trial for an offense carrying a maximum prison term of six months or less "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 543 (1989). Lee's conclusory argument regarding the unconstitutionality of 18 U.S.C. § 3571, the statute addressing fines, fails to make such a showing. The case cited by Lee, *Schick v. United States*, 195 U.S. 65 (1904), does not support his argument that his case was somehow converted into a civil action requiring a trial by jury.

According to Lee, the potential punishments that he faced required appointment of advisory counsel. A defendant does not have a constitutional right to advisory counsel. See *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *United States v. Lawrence*, 161 F.3d 250, 253 (4th Cir. 1998); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994). Regardless, Lee never requested appointment of counsel, advisory or otherwise.

In his reply brief, Lee asserts that there was a lack of credible evidence that he committed a traffic crime beyond a reasonable doubt. An issue raised for the first time in a reply brief is deemed waived on appeal. *United States v. Kalymon*, 541 F.3d 624, 632 (6th Cir. 2008). To the extent that Lee's opening brief can be construed to challenge the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Based on Ranger Gad's testimony that he observed Lee pass a vehicle in a no passing zone within a national park, there was sufficient evidence to support Lee's conviction for failing to comply with the directions of a traffic control device within an area under the jurisdiction of the National Park Service in violation of 36 C.F.R. § 4.12. Lee challenges the credibility of Ranger Gad's testimony; however, we may not reevaluate the credibility of a witness in reviewing the sufficiency of the evidence. *United States v. Deitz*, 577 F.3d 672, 677 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1720 (2010). Contrary to Lee's arguments, the government was not required to prove that he was a commercial driver for hire or that anyone was injured by him or to enter into evidence provisions of the Tennessee Code or a traffic engineering survey to establish a violation of 36 C.F.R. § 4.12.

For the foregoing reasons, we affirm the district court's order affirming Lee's conviction. Lee's motion for review of the discovery motions is granted, and his other pending motions are denied as moot. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT



Clerk